Supreme Court, U.S.
FILED
DEC 18 2000
OF THE CLERK

No. 001050

In the Supreme Court of the United States

JANADRICK KEMONT DRONES
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

GREGORY H. KAHN
(Counsel of Record)
1301 20th St. NW, Suite 903
Washington, D.C. 20036-6025
(202) 833-2464

JOHN T. BOUNDAS
Fulbright & Jaworski L.L.P.
1301 McKinney, Suite 5100
Houston, TX 77010-3095
(713) 651-3671

Counsel for Petitioner

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20483

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JANADRICK KEMONT DRONES,

Defendant-Appellee.

July 25, 2000

Kathryn Giannaula Snyder (argued), James Lee Turner, Asst. U.S. Atty., Houston, TX, for Plaintiff-Appellant.

John T. Boundas (argued), Fulbright & Jaworski, Houston, TX, Gregory H. Kahn (argued), Reporters for Freedom of the Press, Arlington, VA, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before REYNALDO G. GARZA, JONES and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Appellee Janadrick Kemont Drones was convicted of (1) conspiracy to possess crack cocaine with intent to

distribute and (2) aiding and abetting possession of crack cocaine. Drones petitioned for federal habeas corpus relief claiming, *inter alia,* ineffective assistance of counsel. After conducting an evidentiary hearing, the district court granted habeas relief, holding that Drones's trial counsel was ineffective in failing to investigate and present voice identification evidence. The district court then vacated Drones's convictions and ordered a new trial. The United States of America (the "government") now appeals the district court's ruling, arguing that Drones received effective assistance of counsel. For the reason set forth below, we reverse the judgment of the district court.

I

A

On April 25, 1995, Sergeant Gregory Haire of the Texas Department of Public Safety ("DPS") met with two confidential informants ("CIs") about arranging a purchase of crack cocaine. Pursuant to Haire's request, the CIs contacted two individuals whom they had identified as possible drug dealers. When one of the individuals returned the call, DPS recorded the telephone conversation as well as a second call from the same individual made later the same day. During the course of these conversations, the CIs planned to meet the caller at a Burger King restaurant to complete the drug transaction.

Later that afternoon, Haire and the CIs went to the parking lot of the Burger King where they saw a parked Ford Mustang. When the CIs approached the vehicle, the occupants of the car – Vernon and Arnold Freddie (the "Freddies") and Drones – let them into the car and began to weigh the drugs. When Haire signaled for arrest, nearby officers surrounded the car and arrested the Fred-

dies as well as Drones, who was by then standing outside of the car. Drones and the Freddies were charged with (1) conspiring to possess cocaine base with intent to distribute, (2) aiding and abetting in the possession of cocaine base with intent to distribute, and (3) aiding and abetting in the use and carrying of a firearm in relation to a drug trafficking offense.

Drones was tried with Vernon Freddie.[1] Before the case was submitted to the jury, the trial court granted Drones's motion for judgment of acquittal on the firearm count but denied Drones's motion with respect to the other two counts. At trial, Haire testified that Drones was sitting in the driver's seat during part of the drug transaction. At the time of the arrest, Haire stated, Drones was standing outside of the car and "made a motion as if to attempt to run" when approached by the police. When the police searched the vehicle, they found packages of cocaine in the front passenger compartment.

While Haire was on the witness stand, the government tapes were played for the jury, and Haire testified that he recognized Drones's voice as the "unknown" speaker on the tapes. On cross-examination of Haire, Drones's court-appointed counsel, Christopher Goldsmith, emphasized the sloppy nature of the police investigation and the fact that, despite the high reliability of voice identification evidence, the government had put forth no expert testimony identifying Drones's voice as the unknown voice on the tapes. Goldsmith presented no expert voice identification evidence of his own.[2]

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[1] Arnold Freddie pled guilty to all three counts. Vernon Freddie pled guilty to the conspiracy and aiding and abetting charges and therefore was only tried for the firearm charge.

[2] The government presented two additional trial witnesses: (1) a chemist who testified that the substance found at the scene

[footnote continued]

Goldsmith called several witnesses to testify in Drones's defense. First, the Freddies both testified that Drones did not participate in the drug transaction. Arnold Freddie further testified that he was involved in the taped phone conversations, and that he did not recognize Drones's voice on the government tapes. He stated that the first time he met Drones was in the Burger King parking lot.

Next, Krisna Brown-Drones ("Krisna"), Drones's then-fiancee, testified that she was with Drones on the day of the arrest. More specifically, she testified that she and Drones were at her sister's apartment, which did not have a phone, between noon and 4:30. At approximately 4:30, Krisna testified, Drones left the apartment to get something to eat.

The jury convicted Drones of both drug charges. Shortly thereafter, the trial court reconsidered and granted Drones's motion for judgment of acquittal on the conspiracy and aiding and abetting claims. In reversing its prior ruling, the court found that (1) Drones's voice was probably not on the tape, and (2) the government had presented insufficient evidence to convict Drones. The government appealed, and we reversed and remanded with instructions to the district court to reinstate the jury verdict. On remand, the district court reinstated the verdict and sentenced Drones to 210 months imprisonment. We affirmed the conviction and sentence.

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was crack cocaine; and (2) an ATF agent who testified that the gun found in the car was operational.

B

Drones filed a timely motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255 claiming, *inter alia,* that he was denied effective assistance of counsel. Specifically, Drones contended that Goldsmith had rendered ineffective assistance by failing to investigate and present expert and layperson voice identification testimony that his voice was not on the government tapes. The district court conducted an evidentiary hearing on the issue of "whether counsel's failure to investigate exculpatory evidence regarding Drones's identity rendered his performance constitutionally deficient."

Drones, represented by newly appointed counsel, presented four witnesses at the evidentiary hearing. First, Steve Cain, a forensic scientist and voice identification expert, testified about the procedures used in voice analysis and his own analysis of the government tapes.[3] Cain testified that, after comparing the unknown voice on the government tapes with a voice exemplar obtained from Drones, he reached a finding of "probable elimination," meaning that at least 80% of the comparable words in the samples were dissimilar aurally and spectrographically.[4]

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[3]Cain's qualifications are extensive. At the time of trial, he was the president of Applied Forensic Technologies International. Prior to that, Cain spent twenty-two years working for various governmental agencies as a forensic specialist. Cain has been certified in voice identification and/or tape analysis by the Treasury Department, the International Association for Identification, and the American College of Forensic Examiners.

[4]Voice identification analysis consists of both "critical listening," which essentially requires an expert to carefully listen to the qualities of two voices, and spectrographic analysis. In the latter phase, a computer-based instrument compares the frequen-

[footnote continued]

While Cain testified that there were published recommendation procedures for conducting voice identification examinations, he also acknowledged several weaknesses in spectrographic analysis. Specifically, he testified that there was no set of objective criteria against which to check the accuracy of a particular expert's analysis and that voice identification analysis was largely subjective in that the examiner ultimately decides whether two spectrographs match one another.

Krisna testified that she was familiar with Drones's voice and therefore able to distinguish it from other voices. She further testified that Goldsmith never asked her to listen to the audiotapes prior to the trial. After listening to the government tapes at the evidentiary hearing, she testified that Drones's voice was not on the government tapes.

Next, Lieutenant Colonel Dave Johnson, Drones's grandfather, testified that he was also familiar with Drones's voice, and that Goldsmith had never asked him to listen to the government tapes. After listening to the tapes at the hearing, he stated that he did not recognize Drones's voice on the tapes. Johnson further testified that while he had suffered some hearing loss, that loss did not prevent him from recognizing Drones's voice.

Goldsmith also testified at the evidentiary hearing. He stated that he considered the tape to be a "critical" piece of evidence at the trial because, without the identification of Drones's voice, the government would have

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cies and amplitudes of a voice on a questioned recording with those of a known sample. Both Cain and the government's expert, Bruce Koenig, testified that there were seven possible results of a voice identification analysis: identification, probable identification, possible identification, inconclusive, possible elimination, probable elimination, and elimination.

had a "much more difficult time" proving that Drones was part of a conspiracy. He also stated that "several week or months" before trial, Drones told him that it was not his voice on the tape. While Goldsmith listened to the tape several times, he was unable to determine whether or not Drones's voice was on the tapes. Most importantly for the purposes of this appeal, Goldsmith testified that he made a "strategic decision" to base Drones's defense upon sloppy police work, the alibi testimony of Brown, and the Freddies' testimony, rather than upon expert voice identification testimony that Drones's voice was not on the government tapes. Because of this decision, Goldsmith testified, he never sought out expert or layperson evaluations of the tapes.

Finally, the government presented the expert testimony of Bruce Koenig, a private consultant and former Federal Bureau of Investigation employee.[5] Koenig testified that very little research has been done in the area of "courtroom application of spectrographic voice identification," largely because since the 1970's, many researchers have felt that spectrographic comparison could not produce reliable results. He stated that "almost nobody" in the relevant scientific community uses spectrographic voice identification because there is no theoretical basis for the proposition that an individual's voice is truly unique and identifiable. Nonetheless, Koenig, like Cain, found a "probable elimination" as to one of the government tapes. With respect to the other tape, Koenig used only "critical listening" and con-

[5] Koenig's credentials are also examplary. At the time of trial, he was a private consultant involved in audio and video analysis. Prior to entering private practice, Koenig was employed as a supervisory special agent in the FBI where he also conducted audio and visual analysis.

cluded that Drones's voice was dissimilar to the voice on the government tapes.

After making extensive findings of fact and law, the district court held that Drones was denied effective assistance of counsel due to Goldsmith's failure to investigate the identity of the voice on the government tapes, and it granted habeas relief. More specifically, the district court found that counsel did not make a "reasonable and informed choice to forego investigation of the tape after listening to the tape on his own" and that "by choosing not to investigate or present such evidence, Goldsmith denied the jury the opportunity to hear this potentially exculpatory evidence on [the issue of voice identification]." The government filed this timely appeal in which it contends that (1) defense counsel's decision not to investigate the identity of the voice on the tape was a reasonable strategic legal decision, and (2) even if counsel's performance was deficient, that deficiency did not prejudice Drones's defense. We review a district court's finding of fact on requests for habeas relief for clear error and its rulings on issues of law *de novo*. *See Fairman v. Anderson*, 188 F.3d 635, 640 (5th Cir. 1999). Determinations regarding the effectiveness of counsel are mixed questions of law and fact which we review *de novo*. *See Ransom v. Johnson*, 126 F.3d 716, 721 (5th Cir. 1997).

II

We review ineffective assistance claims under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, a petitioner must demonstrate that his attorney's performance was deficient. *See Strickland*, 466 U.S. at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674. In

order to be deficient, counsel's performance must be "outside the wide range of professionally competent assistance." *Id.* at 690, 104 S.Ct. 2052, 80 L.Ed.2d 674. If he succeeds in satisfying the first hurdle, then a petitioner must also demonstrate that the deficient performance prejudiced the defense such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *see also Bryant v. Scott,* 28 F.3d 1411 (5th Cir. 1994).

A

Our review of counsel's performance is "highly deferential," and we "indulge a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. Recognizing that in "failure to investigate" cases the temptation to rely on hindsight is strong, the Supreme Court stated that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690, 104 S.Ct. 2052, 80 L.Ed.2d 674. However "strategic choies made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674. *Strickland* does not require us to defer to decisions that are uninformed by an adequate investigation into the controlling facts and law. *See Moore v. Johnson,* 194 F.3d 586, 615 (5th Cir. 1999).

There is little doubt that Goldsmith failed to make any, let alone a reasonable, investigation into the identity of the unknown voice on the government tapes. Goldsmith himself testified at the evidentiary hearing that he never even investigated the availability of expert voice identification analysis of the tapes. He further testified that he chose not to play the tapes for either Drones or members of his family. Both Krisna and Johnson testified that while Goldsmith conferred with them before trial, he never asked them to review the tapes. Accordingly, the question here is whether Goldsmith's decision to limit his investigation so as to develop neither expert nor lay-person identification testimony was reasonable under the circumstances. *See Strickland*, 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674; *id.* at 699, 104 S.Ct. 2052, 80 L.Ed.2d 674 (stating that when assessing counsel's conduct, we must "reconstruct the circumstances of counsel's challenged conduct and [evaluate] the conduct from counsel's perspective at the time").

As an initial matter, we note the significance of the government tapes to the prosecution's case. Drones was charged with both aiding and abetting possession of crack cocaine and conspiracy to possess crack with an intent to distribute. Probative to both claims were the taped conversations in which the CIs planned to meet an unknown caller to complete a drug transaction. The government presented only one witness – Officer Haire – to testify that he recognized Drones's voice on the government tapes. *See* Fed.R.Evid. 901(b)(5) (providing that "identification of a voice . . . by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker" satisfies Rule 901's authentication/identification requirement). At the evidentiary hearing, Goldsmith conceded that the tapes were

"crucial" to the government's case and that without them, the government would have had a "much more difficult time" proving that Drones was part of a conspiracy. Thus, going into trial, Goldsmith knew that the government had a key piece of direct evidence linking Drones to a conspiracy, and he knew that his client had to challenge the validity of that piece of evidence. The district court held that, under these circumstances, Goldsmith should have pursued both expert and layperson identification testimony in an effort to determine whether the voice on the tape was in fact Drones's voice, and that his failure to do so constituted constitutionally deficient conduct.

We turn first to counsel's decision not to investigate certain layperson identification testimony. Goldsmith testified that his decision not to play the tape for Johnson was based on his concerns that Johnson's testimony (1) would have been impeachable due to his familial relationship with Drones and (2) could have opened the door to questioning about Drones's prior narcotics convictions. Goldsmith chose not to play the tapes for Krisna because he believed that her testimony would have been cumulative given her alibi testimony. We find that these concerns were valid and his decisions were part of a plausible trial strategy. Goldsmith was correct that, if Johnson testified, he could have opened the door to questions about Drones's prior drug convictions. Counsel's decision not to pursue evidence that could be "double-edged in nature [was] objectively reasonable and therefore does not amount to deficient performance." *Lamb v. Johnson*, 179 F.3d 352, 358 (5th Cir. 1999) (quoting *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir. 1997)); *Kitchens v. Johnson*, 190 F.3d 698, 702-03 (5th Cir. 1999) (finding that counsel's decision

not to investigate mitigating evidence of child abuse, alcoholism, and mental illness was sound trial strategy). Similarly, Goldsmith determined that Krisna's identification testimony would not have been of additional help to Drones's defense given that she had already provided alibi testimony that, if believed, would have made it impossible for Drones to have made the recorded phone calls. This determination was not unreasonable under the circumstances. Since Goldsmith would not have presented either Krisna or Johnson's testimony at trial, his decision not to investigate the substance of that potential testimony was reasonable.

We find Goldsmith's failure to investigate the availability of expert spectrographic analysis of the tapes more troubling. Having ruled out two possible sources of identification testimony in Krisna and Johnson, Goldsmith was still faced with a significant piece of damaging evidence at trial. Under these circumstances, Goldsmith's decision simply to abandon any investigation of the tapes might not seem reasonable. This is not, however, a case in which counsel simply fails to articulate a justification for his limited investigation. Here, our analysis is complicated by the fact that Goldsmith testified that he chose not to investigate spectrographic analysis for strategic reasons. Specifically, Goldsmith testified that, at the start of the case, he made the "strategic decision" to "attack the government's case" rather than to "assume the burden of proof . . . and try to disprove that it was Mr. Drones's voice on the tape." Goldsmith further testified that his choice of trial strategy was influenced by the controversial nature of expert voice analysis. On appeal, the government argues, *inter alia,* that Goldsmith's decision not to pursue spectrographic analysis was objectively reasonable given the

questionable reliability of expert voice identification evidence.

We note as a preliminary matter that Goldsmith's testimony raises serious doubts as to whether he actually knew enough about the relevant law to have made a reasoned legal decision based upon it. *See Loyd v. Whitley*, 977 F.2d 149 (5th Cir. 1992) (finding deficient performance where "counsel's decision had not been made after a thorough investigation of the law; [counsel] was unaware of the law"). Specifically, Goldsmith testified that that his decision was based in part on his belief that "at the time [of trial], the admissibility of this type of evidence was controversial based on the Fifth Circuit law that was in place at the time." Our review of this circuit's case law indicates that we have never before addressed the admissibility of spectrographic evidence.

The government takes Goldsmith's argument a step further and argues that, "regardless of whether Goldsmith acted for the reasons he said he acted," he was reasonable in failing to investigate expert voice identification testimony because the reliability of such evidence was questionable at the time of trial. We recognize that counsel is not required to pursue a line of defense that he knows will be fruitless. *Cf. Nealy v. Cabana*, 764 F.2d at 1178 (finding deficient performance where counsel "did not testify that such efforts would have been fruitless . . . [but] simply failed to make the effort to investigate"). Here, however, there is virtually no indication in the record that Goldsmith ever did enough research into expert voice analysis to make a determination regarding the merits of a defense based on expert testimony. Rather, Goldsmith testified that he decided at the start of the case that he would not investigate any means by which he could affirmatively disprove that

Drones's voice was on the tapes. He then relies on this "strategic" decision to justify his failure to conduct even a preliminary investigation into the availability of expert witnesses in the Texas area.[6]

Nonetheless, despite our reservations as to whether Goldsmith actually knew enough about the law surrounding the admissibility of spectrographic evidence to have made a reasoned legal decision based upon it, *see Loyd*, 977 F.2d at 158 (finding deficient performance where "counsel's decision had not been made after a thorough investigation of the law; [counsel] was unaware of the law"), we find that Goldsmith's failure to investigate can be constitutionally deficient only if it resulted in the exclusion of competent evidence.[7] Given the current state of the law regarding the admissibility of expert

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[6] For example, Goldsmith testified that he did not make a motion for appointment of funds for an expert voice identification analysis because his "decision on the trial strategy made that motion unnecessary." He also testified that, to his knowledge, there was no local expert witness but that he "made the strategic choice before needing to attempt to locate an expert."

[7] While none of our previous cases explicitly hold that a failure to investigage can be deficient only if such failure leads to the exclusion of admissible evidence, the underlying assumption in our prior cases is that an investigation would have resulted in, at the very least, admissible evidence. *See, e.g., Moore v. Johnson*, 194 F.3d at 604 (finding failure to investigate defendant's background and the facts underlying an "accidental shooting" theory was professionally unreasonable); *Bryant*, 28 F.3d at 1418 (holding counsel's failure to investigate alibi witness and eyewitnesses to the crime amounted to constitutionally deficient performance); *Loyd*, 977 F.2d at 157-59 (holding failure to obtain psychological analysis of defendant to present during sentencing phase of trial was not reasonable). In contrast, we are unable to locate any federal case in which a court held that an attorney rendered a constitutionally deficient performance due to his failure to investigate evidence that he would not have been able to present at trial.

voice identification testimony and the expert testimony presented at the evidentiary hearing, we cannot say that counsel's choice of strategy was unreasonable and therefore deficient.

At the time of Drones's trial, four of our sister circuits had upheld the admissibility of spectrographic evidence, *see United States v. Smith*, 869 F.2d 348, 351 (7th Cir. 1989) ("Under the *Frye [v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923)*]* test, several other circuits have held expert testimony concerning spectrographic voice identification admissible . . . . We join these circuits today, and hold that expert testimony concerning spectrographic voice analysis is admissible in cases where the proponent of this testimony has established a proper foundation."); *United States v. Williams*, 583 F.2d 1194, 1201 (2d Cir. 1978) (finding spectrographic analysis admissible under a modified version of the *Frye* test of admissibility); *United States v. Baller*, 519 F.2d 463, 465-67 (4th Cir. 1975) (same); *United States v. Franks*, 511 F.2d 25, 32-24 (6th Cir. 1975) (same), and one appellate court had refused to admit expert voice identification testimony, *see United States v. Addison*, 498 F.2d 741, 745 (D.C. Cir. 1974); *see generally United States v. McDaniel*, 538 F.2d 408, 413 (D.C. Cir. 1976) (finding that court was bound by prior ruling that voice identification evidence was inadmissible but noting trend towards admissibility of "voice-prints"). However, all of these cases were decided before *Daubert v. Merrell Dow Pharmaceuticals*, in which the Supreme Court set out the applicable standard for determining the admissibility of scientific evidence. *See Daubert*, 509 U.S. 579, 589-90, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (holding that Federal Rule of Evidence 702 superceded the "*Frye* standard" of admissibility of scientific evidence and that

under Rule 702, the district court had to determine that proffered expert testimony was both reliable and relevant); *id.* at 593-94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (setting out five non-exclusive factors to assist the district court in determining the reliability of proffered scientific evidence). No federal case decided post-*Daubert* has considered the admissibility of expert voice identification testimony.[8]

In addition to the fact that the state of the law concerning expert voice identification was ambiguous, the expert testimony presented at the evidentiary hearing demonstrates that spectrographic analysis is – and was at the time of Drones's trial – of questionable scientific validity. Most notably, at the hearing, Koenig testified that there is no proven theoretical basis for the basic underlying premise that one person's voice is truly unique and therefore identifiable. He further stated that this has resulted in a precipitous drop in the number of expert practitioners over the past few decades, from fifty to sixty practitioners in the 1970's to roughly a dozen experts at the time of Drones's trial. While Cain testified that expert voice identification testimony has been used extensively in state and federal courts over the past thirty years, he also testified that he did not know if spectrographic evidence was widely accepted by the relevant scientific community. He also acknowledged that numerous factors – including a defendant's ability to disguise his own voice – could affect the reliability of expert analysis.

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[8]We note that the one state court to address the admissibility of spectrographic evidence post-*Daubert* determined that spectrographic analysis was admissible. *See State v. Coon*, 974 P.2d 386 (Alaska 1999).

Thus, even assuming that expert voice identification would have met the *Daubert* standard, at trial, expert testimony that voice analysis would have indicated a "probable exclusion" of Drones as the unidentified voice on the tape would have almost certainly have been accompanied by, at the very least, a rigorous cross-examination of Drones's expert. Most likely, the government would have also presented Koenig's testimony that spectrographic analysis was, at best, a dwindling science. Beyond this, any expert testimony that Goldsmith could have presented would have been further impeached by the substantial circumstantial evidence of Drones's participation in the drug conspiracy.

In sum, given the uncertainty of the current state of the law regarding the reliability and admissibility of expert voice identification evidence, and the vulnerability of such expert testimony at trial, we simply cannot say that Goldsmith's choice of strategy – and specifically his decision to attack the government's case rather than to rely on expert voice identification testimony – was unreasonable.[9] Accordingly, his representation of Drones was not constitutionally deficient.

B

Additionally, Drones cannot prevail under *Strickland* because he is unable to prove that he was prejudiced by his counsel's actions. *See Strickland,* 466 U.S. at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674. In order to satisfy the prejudice prong of Strickland, Drones must show "more than the mere possibility of a different outcome." *Ransom,* 126 F.3d at 723. Rather, a petitioner must present

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[9]We do not reach the question of whether expert voice identification testimony is admissible under *Daubert.*

"evidence of sufficient quality and force to raise a reasonable probability that," had it been presented to the jury, the outcome would have been different. *Id.; see also Strickland,* 466 U.S. at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (holding that in order to show prejudice, defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). We find that, under the facts of this case, the district court erred in concluding that Drones met this substantial burden. More precisely, we find that given the existence of other circumstantial evidence against Drones, Drones cannot demonstrate that Goldsmith's failure to investigate and present expert voice identification testimony prejudiced his defense.[10]

While the government tapes were clearly important to proving the overall conspiracy, this is not a case where a determination of guilt rested entirely on this evidence. To the contrary, here, even assuming Drones's voice was not on the tape, there was additional significant circumstantial evidence in the record to support the jury's convictions.

In order to prove a drug conspiracy, the government must present evidence of (1) an agreement between two or more persons to violate narcotics laws, (2) a defendant's knowledge of the agreement, and (3) a defendant's voluntary participation in that agreement. *See United States v. Chavez,* 119 F.3d 342, 347 (5th Cir. 1997).

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[10] Because we find that Goldsmith's failure to investigate layperson testimony from Krisna and Johnson was reasonable, the government correctly isolates the issue here as whether Goldsmith's failure to investigate voice identification testimony was prejudicial to Drones's defense.

The agreement that forms the basis of a conspiracy charge can be implicit, and a jury may infer its existence from circumstantial evidence. *See United States v. Thomas*, 12 F.3d 1350 (5th Cir. 1994); *see also Chavez*, 119 F.3d at 347 ("A defendant's presence and association with other members of the conspiracy, when supported by other evidence, may be used to support a finding of conspiracy."); *United States v. Gallo*, 927 F.2d 815, 820 (5th Cir. 1991) ("The Government is not required to prove the existence of the conspiracy and the agreement between the co-conspirators and the defendant by direct evidence, but may present circumstantial evidence, such as the co-conspirator's concerted actions, from which the jury can infer that a conspiracy existed."). The essential elements of an aiding and abetting claim are (1) association with a criminal drug venture, (2) participation in the venture, and (3) action by the defendant that, in some way, tries to make the venture succeed. *See Chavez*, 119 F.3d at 347. Typically, the evidence that supports a conspiracy conviction supports an aiding and abetting conviction. *See id.* at 347.

Here, Officer Haire testified that he observed Drones sitting in the driver's seat of the Mustang during the drug transaction. While Drones was in the car, the Freddies weighed eighteen pieces of crack cocaine. Haire further testified that at some point during the transaction, Drones stepped out of the Mustang and stood beside the car, and that when the officers approached the vehicle, Drones attempted to flee the parking lot. When the officers searched the vehicle, they found packages of crack in the front passenger compartment of the vehicle. Viewed as a whole, this evidence of concerted action and flight is strong support for the jury verdict. *Cf. Gallo*, 927 F.2d at 820 ("The existence of the agreement,

the defendant's participation in the conspiracy may be inferred from the 'development and collocation of circumstances.' "); *United States v. Thorn*, 917 F.2d 170, 173 (5th Cir. 1990) ("If Thorn understood the unlawful nature of the activity and knowingly or intentionally joined it on at least one occasion, that was sufficient to convict him of conspiracy, even though he played only a minor role in the scheme."). The same evidence could also establish Drones's association with a criminal narcotics venture and his participation in it. *See United States v. Gallo*, 927 F.2d 815, 822 (5th Cir. 1991) ("The same evidence that establishes [a defendant's] knowing and voluntary participation in the conspiracy also establishes his association with the criminal venture and participation in it."). Specifically, the fact that eighteen pieces of crack cocaine were weighed while Drones sat in the driver's seat of the car is strong circumstantial evidence of his association with and participation in the sale of that crack.

The fact that – even if Goldsmith had conducted a thorough investigation – at trial, the jury would have been presented with considerable circumstantial evidence of Drones's guilt leads us to conclude that Drones was not prejudiced by counsel's deficient conduct.

III

For the foregoing reasons, we REVERSE the judgment of the district court and REMAND with instructions to deny habeas relief.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-98-146

Criminal Action No. 95-125-3

UNITED STATES OF AMERICA,

Plaintiff-Respondent

versus

JANADRICK KEMONT DRONES

Defendant-Petitioner

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pending before the Court is Petitioner's motion to vacate sentence under 28 U.S.C. §2255. (Cr. Instrument No. 166/Civ. Instrument No 1). Having reviewed the submissions of the parties and the applicable law, the Court enters the following findings of fact and conclusions of law, pursuant to 28 U.S.C. §2255. Any finding of fact that is more appropriately characterized as a conclusion of law shall be so construed.

I. Background

On April 25, 1995, Sergeant Gregory Haire ("Haire") of the Texas Department of Public Safety ("DPS") met with two confidential informants about arranging an undercover purchase of eighteen ounces of crack cocaine from individuals whom the informants had identified as possible drug sellers. Pursuant to DPS instruction, the informants then contacted these individuals by pager. One of the individuals thereafter telephoned. DPS recorded this and a subsequent conversation occurring between the parties that day. It was during these conversations that the parties planned to meet later that same afternoon at a nearby Burger King restaurant to complete the drug transaction.

At 4:30 p.m., Haire and the informants approached a 1995 Mustang parked in the Burger King parking lot. The car was occupied by Vernon Freddie and Arnold Freddie. The informants got into the car and gave Vernon Freddie a scale with which to weigh the drugs. At approximately the same time, Haire signaled for arrest, causing officers in the nearby vicinity to surround the car. Janadrick Drones ("Drones") was found standing outside the vehicle. He and the Freddies were immediately arrested and charged by superseding indictment with conspiring to possess cocaine base with intent to distribute (Count 1), with aiding and abetting in the possession of cocaine base with intent to distribute (Count 2), and with aiding and abetting in the use and

carrying of a firearm in relation to a drug trafficking offense (Count 3) in violation of 18 U.S.C. §§2, 924(c) and 21 U.S.C. §§841(a)(1) and 846.

Arnold Freddie subsequently pled guilty to all three charges. Vernon Freddie pled guilty to Count 1 and Count 2 but was tried on Count three along with Drones who contested each of the counts brought against him. At trial, Haire testified that he recognized Drones' voice as one of the voices on the tape recorded conversations. Haire also testified that Drones was inside the car during the attempted transaction. However, Arnold Freddie and Vernon Freddie, testifying on behalf of Drones, claimed that although Drones was present at the scene during the transaction, he was not, contrary to Haire's testimony, inside the vehicle with the informants when they were weighing the drugs.

Before the case was submitted to the jury, the Court granted both Drones' and Vernon Freddie's motions for judgment on the firearm count but denied Drones' motion for judgement of acquittal on the remaining counts. Drones was thereafter convicted by the jury on such counts. However, on October 3, 1995, the Court, on its own motion, reconsidered Drones' motion for judgment of acquittal, reversed its previous ruling and granted the motion, and acquitted Drones after concluding that Drones' voice was probably not the voice on the tape. The Court concluded that the Government had presented insufficient evidence

from which the trier of fact could determine Drones' guilt beyond a reasonable doubt.

The United States appealed the grant of acquittal and on July 2, 1996, the Fifth Circuit reversed and remanded, instructing this Court to reinstate the verdict of the jury. On remand, the Court reinstated the verdict and sentenced Drones to 210 months confinement and a five year term of supervised release. The Court also imposed a $10,000 fine and a $100 special assessment against Drones. Drones appealed. On July 1, 1997, the Fifth Circuit affirmed both Drones' sentence and conviction.

Now pending before this Court is Drones' Motion to Vacate, Set Aside or Correct Sentence filed pursuant to 28 U.S.C. §2255 on January 22, 1998. Drones claimed that "trial counsel's failure to investigate a critical source of exculpatory evidence relating to the identification of Drones' voice rendered [his performance] constitutionally defective" and that the "trial court erred in imposing an excessive fine of ($10,000.00) upon the petitioner without first making a specific finding as to Petitioner's ability to pay. . ." (Memorandum in Support of 28 U.S.C. §2255, Instrument No. 166 at I). On March 20, 1998, the Court dismissed Drones' claim regarding the fine assessed against him. On April 6, 1998, Respondent filed its answer to Drones' motion, arguing therein that Drones' ineffective assistance of counsel claim should be

dismissed without an evidentiary hearing because Drones has failed to plead with sufficient specificity facts showing that trial counsel's alleged failure to investigate prejudiced Drones' case in any manner or rendered the proceeding against him fundamentally unfair and unreliable.

The Court held an evidentiary hearing on November 6, 1998, on the sole issue of whether counsel's failure to investigate exculpatory evidence regarding Drones' identity rendered his performance constitutionally deficient. Drones presented an expert in voice identification and spectrography, who testified that Drones' voice was probably not the voice on the tape. The Government also presented a rebuttal expert witness, who concluded that Drones' voice was probably not the voice on the tape.

II. Findings of Fact

1. Drones' voice identification expert, Steve Cain ("Cain"), is a forensic scientist. He is certified as a forensic examiner with three different organizations in voice identification: the American Board of Recorded Evidence; the Association of Forensic Document Examiners; and the American College of Forensic Examiners. Cain has reviewed voice identification evidence in over 1000 cases.

2. The American Board of Recorded Evidence has established requirements and standards for recorded voice comparisons. (PX 8).

3. The voice identification process employs two types of voice analysis: first, an aural comparison established by listening to the voice exemplars; and second, a more objective method by studying voice spectrographs.

4. After concluding a voice identification analysis, an expert can reach only one of seven possible conclusions: identification; probable identification; possible identification; inconclusive; possible elimination; probable elimination; or elimination. (PX 8).

5. The copy of the government tape (PX 9) contained three recorded conversations. In preparing his analysis, Cain listened to conversations 1 and 3, the conversations in which Drones is accused of being a party. The quality of the copy of the government tape was adequate to render an expert opinion.

6. Cain obtained a voice exemplar of Drones on the telephone (PX 10), by having Drones repeat each of the phrases in conversations 1 and 3. Drones repeated these phrases on three to five occasions.

7. Cain compared the unknown voice on the Government's tape from conversations 1 and 3 to the

voice exemplars obtained from Drones. Cain completed a critical listening analysis of the phrases.

8. Cain then obtained voice spectrographies of the unknown voices from the Government tape in conversations 1 and 3, and Drones' voice exemplar. Cain performed a spectrographic analysis by comparing the spectrographies of the unknown voice with the spectrography of Drones' exemplar.

9. Cain concluded there was a probable elimination, indicating that Drones' voice was dissimilar to the unknown voice on the tape. In order to reach a finding of probable elimination per the American Board of Recorded Evidence Standards, at least 80% of the comparable words must be very dissimilar aurally and spectrally, producing not less than 15 words that do not match.

10. Cain stated that the original government tape was of superior quality to the copy he was given. Cain concluded that he may have been able to make a positive elimination with the original tape, due to its superior sound quality. In order to reach a finding of elimination per the American Board of Recorded Evidence standards, at least 90% of all the comparable words must be very dissimilar aurally and spectrally, producing not less than 20 words that do not match.

11. Krisna Brown Drones ("Brown"), Drones' wife, has known him for five and one-half years. She

indicated that she spoke to Drones on a regular basis, almost every day.

12. Brown testified that Christopher Goldsmith ("Goldsmith"), Drones' defense attorney at the criminal trial, never asked her to listen to the tape before the trial. She also stated that Goldsmith never asked her to identify the voice on the government tape, nor testify on that issue at trial.

13. Although Brown testified at the criminal trial, she did not offer any testimony on the voice on the tape. The tape was not played while Brown was testifying at the trial.

14. Brown heard the government tape at the hearing, and stated that she did not hear Drones' voice at any time, although the government transcript of the conversations indicated "D" for Drones's voice. Brown correctly identified Drones' voice when she heard the exemplar at the hearing.

15. Dave Johnson ("Johnson"), Drones' grandfather, has known Drones since birth. Johnson spoke to Drones almost daily during 1992 and 1993.

16. Johnson stated that Goldsmith never asked him to listen to the government tape, or to identify Drones' voice on the tape.

17. When the government tape was played for Johnson at the hearing, he stated the unknown voice was not Drones'.

18. Goldsmith was appointed to be Drones' criminal defense attorney in the summer of 1995. He thereupon met with Drones on several occasions. He spoke with Brown and asked her to testify at the trial. Goldsmith also spoke to Johnson, but in the capacity of a family representative, not as a witness at trial.

19. Goldsmith considered the government tape to be a critical piece of evidence at the criminal trial, because without the identification of Drones' voice on the tape he believed the Government would had difficulty proving that Drones was a member of the conspiracy.

20. Goldsmith was given a copy of the government tape by Assistant United States Attorney Daniel Rodriguez several weeks before the trial. Goldsmith never asked for the original tape.

21. Goldsmith listened to the tape multiple times. Although Goldsmith's office was a five-minute walk from the jail, Goldsmith never brought a tape recorder and the tape for Drones to listen to. Well before the trial, Drones informed Goldsmith that his voice was not on the tape.

22. Goldsmith did not obtain an exemplar of Drones' voice. He made no effort to have an expert compare Drones' voice to the tape. Nor did he procure tests of the tape to determine if Drones' voice was on the tape.

23. Although Goldsmith gave Drones the transcripts of taped conversations, he never asked Drones to read the transcript aloud for the purposes of comparison. Goldsmith listened to Drones' voice in order to compare his voice to the tape, but did not have the tape with him when he did so.

24. Goldsmith failed to ask anyone who was familiar with Drones' voice to listen to the tape. He did not play the tape for either Brown or Johnson to assist in identification of the voice. At his request, Goldsmith's employee listened to the tape. She did not know Drones and had not heard his voice before the appointment. She is not an expert in voice identification, she has no experience in the field of voice identification, she did not take a voice exemplar of Drones nor test the tape.

25. Goldsmith stated that he made a strategic decision to base Drones' defense at the trial on sloppy police work, in lieu of presenting definitive evidence disproving the theory that Drones' voice was on the tape. He stated he accepted Drones' assertion that his voice was not on the tape. At the trial, he attacked the government's failure to take a voice exemplar from

Drones or to have an expert perform a voice comparison, although he decided not to seek an expert analysis of voice comparison of his own.

26. Goldsmith stated he made a decision not to have anyone familiar with Drones' voice listen to the tape. At the trial, Arnold Freddie, a co-defendant whose voice was identified on the tape, testified that Drones' voice was not on the tape. Goldsmith acknowledged that Arnold Freddie had a substance abuse problem, and that both Freddies, as co-defendants, were "not the world's best witnesses."

27. The Government's expert witness, Bruce Koenig ("Koenig"), is a private consultant in the field of audio and video consulting, voice comparison, and tape authentication. Before entering private practice, Koenig was employed by the Federal Bureau of Investigation to perform tape analysis. He has published a number of articles in his fields of expertise.

28. Koenig discussed the spectrographic error rate, and stated it was unknown. He noted that a 1979 report on spectrographs recommended explaining the limitations of spectrographic analysis to the court and the jury, and little research in this area has been performed since.

29. Koenig stated that spectrographic analysis could not definitively show that voice samples were

from two different people; rather, he stated spectrographic analysis could determine that the voice on two samples was not the same voice.

30. Koenig, like Cain found a probable elimination as to conversation 1 on the government tape. Koenig's definition of "probable elimination" was the same as the American board of Recorded Evidence's standards. He stated that "probable elimination" means the voices are dissimilar, although he did not conclude that the unknown voice was not Drones'.

31. Koenig stated that conversation 3 on the government tape was very short, and one speaker kept speaking over the unknown voice. This made it difficult to find enough words for Drones to repeat in a voice exemplar. Consequently, he relied on aural or critical listening to make a determination. He stated that critical listening did not constitute expertise, and that the average person listening carefully to conversation 3 and Drones' exemplar would arrive at the same conclusion, that the unknown voice on the tape was dissimilar to Drones' voice.

III. Conclusions of Law

1. Ineffective assistance of counsel claims are reviewable under the two prong test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland,* the habeas petitioner has the burden to show, by a preponderance of the evidence, the following: (1)

that his lawyer's performance was deficient and (2) that such deficient performance actually prejudiced the defense to such an extent that a reasonable probability exists that, had counsel not made unprofessional errors, the result of the proceeding would have been different. *Id.* at 694; *Armstead v. Scott,* 37 F.3d 202, 206 (5th Cir. 1994); *Martin v. Maggio,* 711 F.2d 1273, 1274 (5th Cir. 1983). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland,* 104 S.Ct. at 2068; *Armstead,* 37 F.3d at 206.

2. Courts are to be highly deferential to counsel's trial tactics and decisions, avoiding the distorting effects of hindsight, and granting relief on this basis only if the demonstrated failings of counsel are sufficient to undermine confidence in the outcome of the trial. *Valles v. Lynaugh,* 835 F.2d 126, 128 (5th Cir. 1988). With respect to the first prong of the *Strickland* test, Petitioner must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S at 689; *see also Livingston v. Johnson,* 107 F.3d 297, 306 (5th Cir. 1997); *Westley v. Johnson,* 83 F.3d 714, 719 (5th Cir. 1996), *cert. denied,* 117 S.Ct. 773 (1997). A defendant is not entitled to an error free representation and the court will presume, absent evidence to the contrary, that counsel exercised reasonable professional judgment when making all significant decisions. *Bates v. Blackburn,* 805 F.2d 569, 570 (5th Cir. 1986); *Martin,* 711 F.2 at 1279.

3. With respect to the prejudice prong, the Court will evaluate whether the proceeding was fundamentally unfair or unreliable and if so, whether counsel's deficient performance caused this result. *Lockhart v. Fretwell,* 506 U.S. 364, 369-70 (1993); *Westley,* 83 F.3d at 719; *Armstead,* 37 F.3d at 206-07. The petitioner, however, bears the burden of "affirmatively prov[ing], and not merely alleg[ing], prejudice." *DeVille v. Whitley,* 21 F.3d 654, 659 (5th Cir.); *see Matteson v. King,* 751 F.2d 1432, 1441 (5th Cir. 1985) ("[S]uch [conclusory] allegations, standing alone . . do not satisfy the prejudice component of the *Strickland* test."). Once the Court determines that the petitioner fails to meet one part of the *Strickland* test, the Court need not address the other. *Strickland,* 466 U.S. at 697; *Cantu v. Collins,* 967 F.2d 1006, 1016 (5th Cir. 1992).

4. In the instant case, Drones claims trial counsel's performance was constitutionally deficient because he failed both to adequately investigate the case and to obtain evidence that allegedly would have exonerated Drones of the crimes for which he was accused. Drones argues counsel should have employed voice identification analysis to identify the speaker on the government tapes; that counsel should have presented Drones' sister-in-law's testimony as to his whereabouts; that counsel should have obtained records from the motel to corroborate Drones' whereabouts; and that counsel should have ascertained whether or not Drones' fingerprints were in the car. (Memorandum in

Support of §2255 Motion to Vacate Sentence, Instrument No. 166. at 6) ("§2255 Motion"). The Government seeks to place Goldsmith's failure to consult a voice identification expert under the theory of "strategic" attorney decisions. Goldsmith listened to the tape several times, and accepted Drones' assertion that his voice was not on the tape. Although the tape was admittedly the most crucial piece of evidence linking Drones to the conspiracy, Goldsmith stated that he then made a conscious choice not to search for or hire a voice identification expert, not to have a voice exemplar made by Drones, and not to have any people familiar with Drones' voice listen to the tape. Goldsmith testified that he made a strategic decision to base his client's defense on sloppy police work, instead of trying to use objective evidence to disprove the identity of the voice on the tape. Goldsmith stated that it was the Government's burden at trial to affirmatively show that Drones' voice was on the tape, instead of Drones' burden of proving that his voice was not on the tape. (Respondent's Reply to Petitioner's Posthearing Memorandum of Law, Instrument No. 195, at 3-4) ("Respondent's Reply"). Sergeant Haire was the government's key witness, as he testified that Drones was the unknown person on the tape. Haire's testimony was crucial to Drones' conviction. On cross-examination at trial, Goldsmith attacked Sergeant Haire for not obtaining a voice exemplar of Drones' voice, or submitting the exemplar and tape to a voice identification expert for analysis to affirmatively prove Drones' voice was on the tape.

Accordingly, as part of the defense Goldsmith did not present evidence that Drones' voice was not on the tape, or even evidence to create a reasonable doubt concerning Sergeant Haire's testimony.

5. In *Medina v. Barnes,* the Tenth Circuit found ineffective assistance of counsel where the attorney failed to *adequately* investigate a witness whose testimony was crucial to the defendant's conviction. 71 F.3d 363 (10th Cir. 1995). Medina was convicted of shooting Givens at a party. An acquaintance, Myers, also attended the party. At trial, "Myers was a key government witness who provided the only eyewitness testimony identifying petitioner as the killer." *Id.* at 365. Medina's defense was based in part on the assertion that Myers could have been the killer. Although Myers asserted that he did not have a criminal history, Medina's counsel failed to conduct an adequate investigation which would have revealed that Myers knew Givens and had previously engaged in criminal activity with him. *Id.* at 368. The Tenth Circuit found that "Myers' testimony was crucial to petitioner's conviction," and that the evidence counsel should have investigated went "to the heart of Myers' credibility." *Id.* at 368-69. Consequently, the Tenth Circuit held that counsel's failure to investigate issues he knew were critical to Medina's defense constituted deficient performance which prejudiced Medina's defense. *See id.* at 368.

6. Likewise, in this case counsel failed to adequately investigate evidence he knew was critical to Drones' defense. Like Myers, Sergeant Haire's testimony was crucial in establishing Drones' guilt. Myers was the only witness who saw the shooting; Sergeant Haire was the only witness to testify that the unknown voice on the tape was Drones'. The issue of whether the voice on the tape really was Drones was crucial in attacking Sergeant Haire's testimony. Haire testified that he had seen Drones inside the car (although the Freddies said he was never in the car) but that Drones was outside the car at the time of the arrest. Haire testified that Drones' voice was on the tape, which the Freddies also disputed. Had Goldsmith adequately investigated the identity of the voice on the tape, he could have attacked Sergeant Haire's voice identification testimony and credibility with hard evidence, instead of pointing to Haire's lack of proof. At the very least he would have been able to make an *informed* decision regarding a defense strategy.

7. Moreover, Goldsmith did not present credible witnesses to contradict Haire's testimony that Drones' voice was on the tape. Although Krisna Brown, Drones' wife, testified at the trial, she did not present any testimony regarding the identity of the unknown voice on the tape. Instead, Goldsmith examined co-defendant Arnold Freddie, eliciting his testimony that he did not recognize the voice on the tape as Drones' voice. The Government contends that presenting a voice

identification expert's testimony that Drones' voice was not on the tape would have been cumulative, in light of Arnold Freddie's statement. (Respondent's Memorandum, Instrument No. 190, at 6). However, Goldsmith himself admitted that the Freddies, as substance abusers and co-defendants, "were not the world's best witnesses." Arnold Freddie's testimony that Drones' voice was not on the tape surely was not as credible as the same testimony from Drones' wife would have been; and surely it was not as credible as testimony from a police officer.[1]

8. The Government then contends that Goldsmith's decision not to have the tape analyzed was justified in light of the controversy surrounding the admissibility of voice identification evidence and testimony. (Respondent's Reply, Instrument No 195, at 3). The Government agues that the controversy over the reliability and admissibility of voice spectrographic evidence was relevant to a determination of whether or not Goldsmith's decision not to use such evidence was "reasonably professional assistance." (*Id.* at 4).

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[1] If sloppy police work was indeed his strategy, then Goldsmith would not have called *any* witnesses to testify about the voice on the tape. The decision to have Arnold Freddie testify regarding this issue is inconsistent with Goldsmith's theory that it was the Government's burden to prove the voice was Drones', instead of Drones proving that the voice was not his.

9. Federal Rule of Evidence 702 allows the admittance of scientific, technical, or specialized knowledge from an expert witness if it will assist the trier of fact to "understand the evidence or to determine a fact in issue." FED. R. EVID. 702. Previously, under the *Frye* test, the proponent of scientific or technical evidence was required to show that the evidence was reliable and enjoyed "general acceptance" in the relevant scientific or technical field. *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923). The current standard for the admissibility of scientific or technical evidence was enunciated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals,* 113 S.Ct. 2786 (1993). Under the more flexible *Daubert* standard, the trial court must make initial determinations under Rule 104(a) that the evidence possesses sufficient evidentiary reliability, and that it is relevant -- e.g., that it assists the trier of fact. *Id.* at 2796.

10. Pursuant to Rule 104(a), the trial court must make an initial determination that the voice identification evidence presented at the hearing possessed sufficient scientific reliability and relevancy to be admitted as scientific or technical evidence.[2]

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[2]The Government contends that voice identification evidence is controversial, and cites *United States v. Labensat* to imply that voice identification evidence is "disfavored by most courts." 94 F.3d 527, 529 (9th Cir. 1996). In *Labensat,* however, the Ninth Circuit discussed the reliability of eyewitness identification expert testimony, not voice identification evidence.

11. Evidentiary reliability can be shown by proving that the evidence offered is "more than speculative belief or unsupported speculation." *Id.* at 2795. The validity of scientific or technical knowledge can be measured by several factors, including: whether the theory or technique can be tested and whether it has been subjected to peer review or publication; for certain techniques such as polygraph or voice identification, the known or potential rate of error; and the extent to which a theory or technique has received general acceptance (although this is not dispositive). *Id.* at 2796-97.

12. In *United States v. Posado,* 57 F.3d 428, 433 (5th Cir. 1995), the Fifth Circuit held that polygraph evidence would no longer be *per se* inadmissible for any purpose in light of the *Daubert* standard. The defendants claimed they had not consented to the search of their luggage, which resulted in conviction for conspiracy to possess and distribute cocaine. The defendants submitted to polygraph tests to bolster their claim that they did not consent to the search. The Fifth Circuit found that the *per se* rule against admissibility was no longer tenable under *Daubert,* and that the trial court was required to make an initial Rule 104(a) determination as to admissibility. In coming to this conclusion, the court discussed the "tremendous advances [that] ha[d] been made in polygraph instrumentation and technique in the years since *Frye*," such as accuracy, technique, standardization of the requirements for professional polygraphists, extensive

study and publications about polygraph testing, and wide use by the government and employers. *Id.* at 434. In light of the advances in the reliability of polygraph evidence, the admissibility of spectrographic analysis warrants greater consideration. Commentators have noted that polygraph evidence is more problematic than spectrographic analysis, in part because polygraph evidence usurps the jury's function in evaluating credibility and honesty of testimony. Sharon E. Gregory, *Voice Spectrography Evidence: Approaches to Admissibility,* 20 U. RICH. L. REV. 357, 358 n.11 (1986).

13. Notwithstanding *Posado,* the Fifth Circuit has not yet ruled on the admissibility of spectrographic evidence. Several circuits determined under the more stringent *Frye* rule that spectrographic voice analysis had reached a sufficient level of reliability to warrant its use in trials for identification purposes, indicating general acceptance of the technique even in the 1970's. *See United States v. Smith,* 869 F.2d 348 (7th Cir 1989); *United States v. Williams,* 583 F.2d 1194 (2d Cir. 1978); *United States v. Baller,* 519 F.2d 463 (4th Cir. 1975); *United States v. Franks,* 511 F.2d 25 (6th Cir. 1975). *Williams* is acknowledged as one of the leading cases on the admissibility of voice identification analysis (pre-*Daubert*), for its discussion of indicia of reliability of such evidence. In *Williams,* the Second Circuit declared that "it need not be found that spectrographic analysis is infallible. The sole question is whether spectrographic

analysis has reached a level of reliability to warrant its use in the courtroom." 583 F.2d at 1198. The court modified the *Frye* standard and based its analysis on reliability and relevance -- which are now the requirements under *Daubert.* The court discussed six factors which demonstrated that "spectrographic voice analysis evidence [wa]s not so inherently unreliable or misleading as to require its exclusion from the jury's consideration in every case." *Id.* at 1200. The indicia of reliability include: the potential rate of error; the existence and maintenance of standards; the care and concern with which a scientific technique has been employed and whether its lends itself to abuse; analogous relationship to other types of scientific techniques such as handwriting exemplars and ballistics evidence; and finally, the presence of "failsafe" characteristics, such as the quality of the tapes, and the quality of the recordings. *Id.* at 1199. Moreover, the opportunity to cross-examine voice identification experts as to their qualification and the reliability of the process acts as an additional safeguard of reliability. 20 U. RICH. L. REV. at 370.

14. Voice identification analysis has been tested and subjected to peer review or publication, as both experts testified at the hearing. Both testified to the existence and maintenance of standards. Cain used the American Board of Recorded Evidence's standards in making his finding. The standards allow for only seven conclusions. Although Koenig stated that he was not

aware of those standards, he accepted their definition of "probable elimination." Like Cain, Koenig concluded "probable elimination." As previously noted, probable elimination requires 80% of the words to be dissimilar aurally and spectrographically

15. Also under *Daubert,* for certain techniques such as polygraph or voice identification, the court must examine the known or potential rate of error. Both experts discussed the potential rate of error at the hearing. Koenig testified that the error rate for voice identification is unknown. The *Williams* court relied on the most comprehensive study of spectrography at that time (1978), which reported a false identification rate of 6.3%, a rate that decreased to 2.4% when doubtful comparisons were eliminated. 583 F.2d at 1198. Cain testified that the false elimination rate would be higher than the false identification rate. Although the aural analysis component in voice identification is somewhat subjective and may cause discrepancies, the Court agrees with the Fourth Circuit that in regards to voice identification analysis, "[a]bsolute certainty of result or unanimity of scientific opinion is not required for admissibility." *Baller,* 519 F.2d at 466.[3]

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[3]Despite its objection to the reliability of voice identification evidence, the Government nevertheless retained its own expert, Koenig, to perform a voice identification analysis. After conducting his analysis, Koenig's conclusion was the same as Drones' own expert: a finding of "probable elimination," meaning Drones' voice and the unknown voice on

[footnote continued]

16. In light of the *Daubert* factors, the experts' testimony, and the fact that several circuits found voice identification a sufficiently reliable technique even under *Frye*, the Court finds that the voice identification testimony presented at the hearing was sufficiently reliable to be admitted into evidence.

17. As for relevancy, the Government argues that the prejudicial effect of voice identification evidence outweighs its probative value under Rule 403. (Respondent's Memorandum, Instrument No. 190, at 7). It contends that "a jury may be intimidated by claims of scientific validity into assigning an inappropriate evidentiary value to it." (*Id.*). Rule 403 provides that relevant evidence may be excluded "if its probative value is *substantially outweighed* by the danger of *unfair* prejudice." FED. R. EVID. 403 (emphasis added). Thus relevancy is a liberal standard under the Federal Rules. *See* FED. R. EVID. 403; *Moore v. Ashland Chemical Inc.*, 126 F.3d 679, 692 (5th Cir. 1997), *opinion vacated on reh'g on other grounds,* 151 F.3d 269 (5th Cir. 1998), *petition for cert. filed,* U.S.L.W. 3409 (1998). In *Posado,* the Fifth Circuit noted that the risk of prejudice is clearly diminished when the evidence is offered at a pre-trial hearing before a judge, instead of being offered at a trial before a jury. 57 F.3d

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the tape are dissimilar. Thus the Government's argument as to the reliability of such evidence seems questionable, if it sought to provide a rebuttal witness to discredit the technique.

at 435. The Court agrees with the Fourth Circuit's conclusion in *Baller:* "[u]nless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation." 519 F.2d at 466.

18. If Goldsmith had some concern about the admissibility of spectrographic evidence, he could have presented that evidence to the trial court at a pre-trial hearing, thereby obtaining a ruling from the court before unduly prejudicing the jury. However, Goldsmith made no such offer, deciding before he made any thorough investigation that the admissibility of voice identification evidence was too uncertain. Even if the trial court decided that the evidence was admissible, the jury would not have been bound to the evidence and could have assigned whatever weight it desired. Given the centrality of the identification of Drones's voice to the Government's case -- by Goldsmith's admission, the Government would have had a very difficult time proving conspiracy without the tape -- the voice identification evidence was highly relevant. Accordingly, the Court finds that Goldsmith's performance was deficient in not making a preliminary investigation into the identity of the voice on the tape.

19. The second prong of an ineffective assistance of counsel is a showing of "significant" prejudice. *Armstead,* 7 F.3d at 206 (citing *Lockhart v. Fretwell,* 113 S.Ct. 838 (1993)). The defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 104 S.Ct. at 2068. However, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.*

20. The Supreme Court cautioned, however, that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell,* 113 S.Ct. 838, 842 (1993). The defendant must also show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 104 S.Ct. at 2064. Thus in order to satisfy the burden of proving prejudice, Drones must show that but for his counsel's failure to investigate the voice identification evidence, there was a reasonable probability that the outcome of the trial would have been different, and the result that ensued was unfair.

21. The Government argues that there is no presumption of prejudice based on a failure to

investigate. (citing *Woodard v. Collins*, 898 F.2d 1027, 1029 (5th Cir. 1990) ("[A] decision to investigate some issues and not others or even a decision to conduct virtually no investigation is governed by *Strickland* and its progeny"). (Respondent's Memorandum of Law in Opposition to a Finding of Ineffective Assistance of Counsel, Instrument No. 190, at 4) ("Respondent's Memorandum"). Under *Strickland,* "counsel has a duty to make reasonable investigations. . . ." 104 S.Ct. at 2066. "In order to establish prejudice resulting from a failure to investigate, the defendant must make 'a comprehensive showing of what the investigation would have produced.'" *United States v. Balzano,* 916 F.2d 1273, 1296 (7th Cir. 1990) (citations omitted). In other words, "[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." *United States v. Green,* 882 F.2d 999, 1003 (5th Cir. 1989). However, the defendant will not prevail on his ineffective assistance of counsel claim if trial counsel "made a reasonable decision that makes particular investigations unnecessary," *Strickland,* 104 S.Ct. at 2066, or, after a thorough investigation, made a reasonable decision not to use a particular type of evidence or not call certain witnesses at trial. *See Alexander v. O.L. McCotter,* 775 F.2d 595,601 (5th Cir. 1985) (holding that "complaints based upon uncalled witnesses were not favored because the presentation of witness testimony is essentially strategy"); *Groseclose v.*

Bell, 895 F.Supp. 935, 953 (M.D. Tenn. 1995) (holding that strategic choices made by trial counsel after a reasonable investigation are generally insulated from attack under *Strickland*).

22. Drones has alleged that Goldsmith's deficient performance prejudiced the fairness of his trial. Drones argues that Goldsmith should have investigated the identity of the unknown voice on the tape and employed an expert in voice identification to testify at the trial. He argues such evidence would have created a reasonable doubt in the mind of the jury. (*See* §2255 Motion, Instrument No. 166, at 7-8). What the jury believed about the identity of the unknown voice on the tape was central to determining Drones' guilt. The Government's case was far from ironclad. Sergeant Haire was the *sole* witness to testify that Drones' voice was on the tape, and the *sole* witness to testify that Drones was inside the car at the scene of the arrest. Sergeant Haire had never heard an exemplar of Drones' voice before the arrest. He merely heard Drones' voice at the arrest, and then assumed that it was the same as the unknown voice on the tape. Accordingly, if Goldsmith had had the recording analyzed by a voice identification expert, he could have obtained concrete evidence to cast doubt on Haire's testimony. As previously discussed, the Tenth Circuit in *Medina* found that counsel's failure to investigate a piece of evidence crucial to the defense prejudiced the defendant's trial. *Medina,* 71 F.3d 363 (post-*Lockhart* decision); see also *Hadley v. Groose,* 97

F.3d 1131 (8th Cir. 1996) (counsel's failure to investigate crucial alibi evidence constituted prejudice where counsel had names of potential alibi witnesses and knew it was a central issue to defense) (post-*Lockhart* decision).

23. But as Drones correctly points out, Goldsmith made no effort to ascertain that an investigation of the tape would be "unnecessary," much less conduct a "thorough investigation." Goldsmith merely listened to a copy of the government tape himself. He did not attempt a comparison of Drones' voice and the unknown voice on the tape, either on his own or by enlisting the services of an expert. And regardless of whether Goldsmith should have enlisted an expert, he could have easily made a preliminary assessment by asking people more familiar with Drones' voice than himself or his assistant to listen to the tape. Goldsmith did not ask Drones' wife or his grandfather to listen to the tape to confirm his own conclusion that it was not Drones' voice on the tape. Thus Goldsmith did not avail himself of easily available information before making a decision. He did not make a reasonable, informed choice to forego investigation of the tape after listening to the tape on his own. Since he did not conduct a thorough investigation of the tape (admittedly a "critical piece of evidence," without which the Government would have found it difficult to prove a conspiracy), his decision not to present the evidence at trial was not reasonable. *See Medina,* 71 F.3d 363.

24. The Court has already found that voice identification evidence was central to the question of Drones' innocence and could have been admitted as reliable scientific or technical evidence under Rule 702. By choosing not to investigate or present such evidence, Goldsmith denied the jury the opportunity to hear this potentially exculpatory evidence on such a critical issue. Furthermore, Goldsmith chose not to have Drones' wife or grandfather testify at trial as to the voice on the tape.[4] Thus in assessing credibility the jury was forced to choose between believing Officer Haire's testimony that it was Drones' voice on the tape, or co-defendant Arnold Freddie's assertion that it was not Drones' voice. Had Goldsmith investigated this piece of concrete evidence and engaged an expert to testify at the trial, it could have engendered reasonable doubt in the minds of the jury. The fact that Drones' counsel failed to investigate and present a piece of evidence *central* to determining his client's guilt or innocence demonstrates that the trial was unfair-- there is a reasonable probability that the outcome of the trial could have been different, and the conviction was unreliable. The Court finds that Drones' trial counsel was constitutionally deficient, which prejudiced Drones' defense.

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[4]At the hearing, Goldsmith stated that he did not have Krisna Brown or Dave Johnson testify as to the identity of the voice on the tape because as family members, their testimony was subject to impeachment. The Court finds this argument to be somewhat suspect, as Brown did testify as to Drones' whereabouts on the day of his arrest. As a family member, her testimony was subject to impeachment on this issue as well.

25. Accordingly, the Court hereby GRANTS Drones' motion. The judgment is hereby VACATED and set aside. The Court ORDERS that Drones receive a new trial.

IT IS SO ORDERED.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED this the 18th day of March, 1999, at Houston, Texas.

/s/ Vanessa D. Gilmore
Vanessa D. Gilmore
United States District Judge

APPENDIX C

[Filed SEP 19 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20483

UNITED STATES OF AMERICA
Plaintiff - Appellant

v.

JANADRICK KEMONT DRONES
Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 07/25/00,
5 Cir., _____, ____ F.3d ____)

Before REYNALDO G. GARZA, JONES, AND EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Rehearing En Banc, (FED. R. App. P and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.
ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

[Clerk's Note:
See FRAP and Local
Rules 41 for Stay of
the Mandate]

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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§2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a penal of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.